SUPREME COURT, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1697

STANDARD PRESSED STEEL CO., a foreign corporation,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

REPLY BRIEF OF APPELLANT

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INTRODUCTION

A review of the briefs previously submitted reveals the major differences between the parties to include the proper analysis and interpretation of activities performed by appellant within the State of Washington and the interpretation and application of the opinions of this Court in *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (1951), and *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

The purpose of this brief is to clearly show that appellant conducted absolutely no wholesaling activity within the State of Washington and that the *Norton* and *General*

Motors decisions compel a decision in favor of appellant, reversing the opinion of the Washington Court of Appeals below.

COUNTERSTATEMENT OF FACTS

1. Contrary to the State's Characterization of Appellant's Resident Agent as a Salesman, a Review of the Record Reveals Absolutely No Wholesaling Activity Conducted by Appellant Within the State of Washington

As indicated by the appellee (hereinafter referred to for convenience as "State") in its brief, (Br. Appellee 6, 31) the subject gross receipts privilege tax is a tax on the privilege on conducting wholesaling activity within the State of Washington. A review of the record shows that appellant did not conduct substantial wholesaling activity within the State of Washington during the tax years in question, and therefore the tax is repugnant to both the due process and commerce clauses of the Federal Constitution.

The State has attempted to justify the imposition of the tax upon appellant by characterizing appellant's resident employee, Robert Martinson, as a "salesman" (Br. Appellee 14, 41, 44, 51). In attaching this label to Martinson, however, the State fails to point to any wholesaling or promotional activity conducted by Martinson. The State rather relies on the fact that Martinson's title was that of a "sales engineer", his immediate supervisor was the sales manager, and that Martinson did not have a formal degree in engineering. Such facts are not significant or relevant to the issues before the court. The relevant factual inquiry is what Martinson actually did in the State of Washington, to whom did he talk and about what, what did he spend his time doing, and is the nature of his activities such as to justify

the imposition of the unapportioned gross receipts privilege tax. The fact that Martinson's title was that of sales engineer does not make him a salesman or make his activity that of a salesman, any more than his title would make him an engineer. Similarly, the fact that his immediate supervisor was a sales manager is not relevant. Again, his activity in Washington is what is important. Likewise, the fact that Martinson did not have a formal degree in engineering does not change the nature of his activities. In this regard it should be noted that the State is clearly incorrect in its statement that Martinson had "no formal training in engineering". The record shows that appellant provided Martinson with substantial initial and on-going engineering and technical training. (A. 76, 77)

The fact that appellant is qualified to do business in Washington as a foreign corporation is also not significant. (Br. Appellee 31) It does not follow from such qualification that appellant actually did conduct business within the state. The qualification merely enables appellant to do business if they so chose. Once again, the State is relying on a "label" rather than focusing on the activities actually conducted within the state.

Similarly, the State's characterization of the sales activity occurring outside the state as being the mere mechanics of the sales is another attempt to shift the focus away from the actual in-state activities. (Br. Appellee 17, 43) Such characterization would seem to require that Martinson's activity be such that Martinson did everything but take the order. Such is not the case, however. Contrary to the State's assertion that there is no showing in the record of how or where the sales were negotiated or consummated.

the record is clear that all negotiations with Boeing occurred between Poeing and appellant's out-of-state offices. (A. 88, 93) The record is further clear that neither Martinson nor any employees present within the state at any time participated in these negotiations, either directly or indirectly.

The State's assertion that "but for" Martinson there could be no sales to Boeing (Br. Appellee 35, 43, 44) is a further attempt to shift the emphasis away from Martinson's actual activities, is an incorrect assertion, and also is not a valid test for determining the nature, amount or effect of Martinson's activity in Washington. Granted that there could be no sales to Boeing unless appellant qualified as an approved source and further that, under the particular procedure used while Martinson was employed by appellant, the company would receive a form from Martinson entitled "Products Engineering Request" before appellant's out-of-state offices would even consider qualifying a particular fastener. Under these facts, by using a simple cause-in-fact analysis, one could say, as does the State, that but for Martinson's activities there could be no sale because appellant would not even be a qualified source. But it does not follow that Martinson's activities were decisive factors in the Boeing sales, were necesary or essential to the Boeing sales, or that appellant could not make sales to Boeing without an in-state employee. In addition, as shown by the record, Martinson's employment was terminated prior to his deposition, and no one replaced him; yet appellant continued to makes sales to Boeing. (A. 76) The but-for test suggested by the State is also not a valid test to determine whether or not substantial sales activity has occurred or whether such activity is decisive. In the

same sense that but-for Martinson there could be no sales, the same could be said about the inventor of a product, the manufacturer of a product, a shipper, and an itinerant drummer, for example. These activities are not in any sense of the term "sales activities" or decisive factors to a sale. The fallacy of the State's analysis is apparent.

While the State does concede that the activities of the visiting engineer were solely for the purpose of working on engineering problems, and the engineers were not involved with the sales, (Br. Appellee 14) the State somewhat surprisingly characterizes these engineering activities as entering the state and exploiting the local market. (Br. Appellee 24, 51) There is certainly nothing in the record to support such a conclusion, and the State is unable to point to a single fact in the record to show or even imply that the visiting engineers conducted any sales activity in Washington.

In summary, unless the court takes the position that Martinson's enginering activities in connection with the qualification and trouble-shooting process constitute substantial wholesaling activities within the State of Washington, which appellant submits would be contrary to the *Norton* decision, there is nothing in the record to support the assertion that appellant conducted any in-state sales activity, or that his activities were essential, necessary, decisive or instrumental to the Boeing sales, and the imposition of the subject tax is therefore unconstitutional.

THE NORTON ENGINEERS DID PERFORM SERVICES IN CONNECTION WITH THE EXEMPT SALES, WHICH SERVICES ARE SIMILAR TO THOSE OF MARTINSON, AND *NORTON* THEREFORE COMPELS A REVERSAL IN FAVOR OF APPELLANT

1. *Norton* is Controlling Authority and Cannot be Materially Distinguished

Contrary to the State's assertion, (Br. Appellee 13, 39-41, 52) the only reasonable interpretation of this court's opinion in *Norton Co. v. Dept. of Revenue, supra,* is that the Norton engineers did in fact perform engineering services on the direct sales held to be exempt. As shown in appellant's opening brief, (Br. Appellant 17-19) it strains the imagination and flies in the face of common sense to conclude, as does the State, that the Norton engineers were somehow able to refrain from supplying engineering assistance to customers or prespective customers who order direct. In consulting with prospective customers as to their needs, how would the Norton engineers know whether or not the customer planned to order direct or not. And what would initiate such an inquiry of the customer prior to the *Norton* decision. It certainly is not reasonable to assume that these engineering services would not be provided to a customer who ordered direct but seeks engineering assistance and advice in the use of the product.

The State's further attempt to distinguish *Norton* on the basis that the interpretation advanced by appellant is contrary to the *Norton* "burden of disassociation" is likewise without merit. (Br. Appellee 40, 41) In this regard it is settled that the burden on a taxpayer of showing that in-state activity is not associated with in-state sales arises only when extensive and substantial activity is present, which activity if associated with in-state sales would support the imposition of the tax. As stated in *Norton Co. v. Dept. of Revenue, supra:*

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filing and delivery back to the buyer, it is obvious that the state of the buyer has no local grip on the seller." (340 U.S. at 537)

That a certain threshold of activity must be shown for the burden of disassociation to arise is also clear from such cases as *Miller Bros. v. Maryland,* 374 U.S. 340 (1954); *McLeod v. J. E. Dilworth Co.,* 322 U.S. 327 (1944); *Robbins v. Shelby County Taxing District,* 120 U.S. 489 (1887); and *Nippert v. City of Richmond,* 327 U.S. 416 (1946). In these cases, the activities involved, while obviously associated with in-state sales, were not sufficient to justify the imposition of the tax in the first instance, and therefore the taxpayer to prevail was not required to show that these activities were disassociated with the sales in question.

As the only reasonable reading of *Norton* is that the engineers did perform services associated with exempt sales, it is apparent that the court held these activities to be insufficient to justify the imposition of the tax, and therefore the Norton Co. did not have to meet the burden of showing such activities to be disassociated from the exempt sales to prevail. Similarly, in the present case, since appellant's in-state activity is not sufficient to justify the imposition of the tax, therefore appellant does not have to establish that such activities are disassociated from the sales in question.

2. Appellant Has Met the Burden of Establishing Its Claimed Immunity as Required by *Norton*

The State's contention that appellant has failed to challenge the "findings and conclusions" of the Court of Appeals below is confusing to appellant, especially in light of the State's own later contradiction of its contention. (Br. Appellee 25)

Throughout its opening brief, appellant challenged the conclusion by the court below that appellant's in-state activity was instrumental and decisive in the Boeing sales and constituted a sufficient local incident to justify its acts on constitutional principles. In fact, to briefly summarize appellant's position in this case, as found in appellant's opening brief, the conclusion by the court below upholding the imposition of the tax is beyond the realm of permissible judgment, is not supported by the record, and is in conflict with the previous decisions of this court, including *Norton Co. v. Dept. of Revenue, supra.*

As to whether or not appellant has "met its burden of proof", appellant recognizes that in constitutional cases such as the present case, the applicable standard of review is for the court to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that the court will re-examine findings of facts supported by substantial evidence.

Assuming that portions of the opinion of the Court of Appeals below can be separated out as factual findings and conclusions, which is always difficult in an appellate decision, this court is in as good a position as the court below to review the evidence, which is solely in written form, and

undue weight should not be given to any "findings of fact". In this regard, appellant is confident that the court, in exercising its own independent judgment, will agree with appellant that the imposition of the subject tax on appellant is repugnant to the Constitution.

CONTRARY TO THE STATE'S CONTENTION, MARTINSON'S ACTIVITIES ARE DISTINGUISHABLE FROM THE SALES PROMOTIONAL EFORT OF GENERAL MOTORS EMPLOYEES IN WASHINGTON

The State contends that the "basic question at issue is whether or not this cause is factually distinguishable for constitutional law purposes from *General Motors*". A comparison of the facts at the case at bar with the facts in *General Motors* reveals that the cases are distinguishable. In *General Motors* the in-state activity was all geared to sales promotion. In other words General Motors had as the purpose of its in-state activity the promotion of sales through the creation of a felt need by the consumer, and the further promotion of General Motors' products as being best able to fill such consumer's need.

In *General Motors Corp. v. Washington, supra,* this court took four pages to describe the sales promotion activities of General Motors employees in Washington. These activities included programs, plans and procedures to cause the dealer organization to give the best possible business representation in the area; assuring that dealers have a solid sales organization; acquainting dealers with divisional sales policies and promotional and training plans to improve the selling ability of the dealer; distributing promotional materials; advising dealers as to used car inventories; training the dealer sales force; preparing projections of esti-

mated needs which for all practical purposes were purchase orders; assisting in improving the dealer service departments and service department inventories to insure the best possible service to customers; and assisting in the disposition of used cars to appropriate display and reconditioning. General Motors also maintained a parts warehouse in Seattle from which parts were shipped to Washington dealers. The number of General Motors employees in the state assisting in the above-described activities were substantial. The bundle of corporate activity was significant, especially in comparison with appellant's activity in Washington. In addition, General Motors had extensive local business which it conceded was taxable. Based on the above, the court, in a five to four decision, determined that the bundle of corporate activity described above was sufficient to justify the imposition of the tax and further that General Motors failed to disassociate the local business from the activities described above. The *General Motors* decision represents the farthest extension of the power of a state to impose a gross receipts tax on interstate commerce.

In comparison with the activities carried on by Martinson in the State of Washington the contrast it striking. In no way can the nature, magnitude or effect of Martinson's activities be equated with the activities of General Motors in the State of Washington. The court below and the State cannot point to one activity conducted by Martinson within the state which compares with the activities of General Motors. The basic purpose of General Motors in its sales promotion in Washington was to "create" a belief, or build on such a belief on the part of a prospective customer that such customer needed a particular automobile or product,

and further convince such a prospective customer that a particular General Motors automobile or product best filled that need. In the case at bar, the Boeing Company engineers independently determined the Boeing needs for particular products and parts, including fasteners. This need results from Boeing design and specifications as determined by the Boeing engineers, and not from any activity by Martinson. Further, there is nothing in the record to indicate that appellant conducted any in-state activity "promoting" appellant's products as being better able to fill Boeing's minimum standards. Rather, this type of promotional activity was carried on in the negotiation stage, and the record clearly shows that absolutely no negotiations in connection with the sale took place in the State of Washington. The State further cannot point to any court decision in which a gross receipts tax has been imposed on activities so thin and insubstantial as those conducted by appellant in Washington. Certainly if such a case existed the State would have presented it in its brief.

CONCLUSION

In the case at bar the court is faced with two opinions pertaining to the permissible imposition of the business and occupation tax. In *Norton Co. v. Dept. of Revenue, supra,* where the facts are similar to those in the case at bar, the holding of the case dictates a judgment in favor of appellent. The State has failed to come up with any genuine and distinguishing features between the *Norton* case and the case at bar. In both cases the out-of-state company had a local engineer to assist the customer. In both cases, the engineer had nothing whatsoever to do with the actual sale of the product. In both cases, the result should be the same; namely, that the out-of-state company is not subject to the

gross receipts privilege tax, and any taxes paid should be refunded to the maximum extent permitted by law. *General Motors Corp. v. Washington, supra,* on the other hand involves a very different factual pattern, and appellant respectfully contends that both the court below and the State have erroneously applied the *General Motors* case to the case at bar, and on the basis of some very general and ambiguous language in the *General Motors* opinion, concluded that the *General Motors* case would somehow dictate a different result than would occur under the *Norton* opinion. This appellant respectfully contends is error, and appellant further contends that the application of the *General Motors* case by the Court of Appeals below is a radical extension of that opinion.

Since the activities performed by the Norton Company engineers and appellant's engineer are sufficiently similar in all material respects, on the controlling authority of *Norton,* appellant respectfully submits that the judgment below should be reversed and remanded with directions to refund to appellant the stipulated sum of $33,444.91.

Respectfully submitted,

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